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ARIZONA COURT OF
APPEALS DIV. TWO
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FARMERS INVESTMENT COMPANY, a corporation, Appellant,	)
vs.	) No. 2CA-CIV-1755
THE ANACONDA COMPANY, a corporation; AMAX COPPER MINES, INC., THE ANACONDA COMPANY, as partners in and constituting ANAMAX MINING COMPANY, a partnership; ANAMAX MINING COMPANY, a partnership, Appellees.	) Pima County) Superior Court) No. 116542

11439-2

FILED
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ABSTRACT OF RECORD ON APPEAL
Volume I, pages 1-120

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SUPERIOR COURT OF ARIZONA

PIMA COUNTY

FARMERS INVESTMENT COMPANY, a corporation, Plaintiff, vs. THE ANACONDA COMPANY, a corporation; AMERICAN SMELTING & REFINING COMPANY, a corporation; DUVAL CORPORATION, a corporation; PIMA MINING COMPANY, a corporation; BOYD LAND AND CATTLE COMPANY, a corporation; DUVAL SIERRITA CORPORATION, a corporation; AMAX COPPER MINES, INC., and THE ANACONDA COMPANY as partners in and constituting ANAMAX MINING COMPANY, a partnership and ANAMAX MINING COMPANY; ANDREW L. BETTWY, as State Land Commissioner and THE STATE LAND DEPARTMENT, a department of the State of Arizona, Defendants.	No. 1165-2

* * *

(TITLE OF ACTION)

AMENDED COMPLAINT COUNTS
ONE, TWO, THREE (Filed
November 8, 1973)

Filed: November 8, 1973

COMES NOW plaintiff and files this its Amended Complaint pursuant to Order of this Court. The Order authorizing the filing of this amendment authorized an amendment limited to reflecting the addition of AMAX COPPER MINES, INC. as a partner in ANAMAX MINING COMPANY, a partnership, and ANAMAX MINING COMPANY, a partnership consisting of THE ANACONDA COMPANY and AMAX COPPER MINES, INC., as defendants and accordingly this amendment is so limited without prejudice to FARMERS INVESTMENT COMPANY'S right to further amendments, if required by the evidence

and authorized by the Court.

COUNT ONE

I

THE ANACONDA COMPANY is a corporation duly qualified and authorized to do business in Arizona; AMAX COPPER MINES, INC., is a corporation authorized to do business in Arizona; AMAMAX MINING COMPANY is a partnership consisting of THE ANACONDA COMPANY and AMAX COPPER MINES, INC. Each of the other defendants in this Count One is a corporate entity doing business in the State of Arizona and the County of Pima.

II

That the plaintiff is the owner of approximately 7,000 acres of irrigated land in Pima County, located in the Santa Cruz Valley, south of the City of Tucson, Arizona; that said lands have been irrigated for agricultural purposes for many

years, some of the plaintiff's lands have been irrigated and farmed by its predecessors in interest prior to 1915; that all of the plaintiff's lands are located within the Sahuarita-Continental critical water area so designated by the State Land Department on October 14, 1954, in pursuance of the authority invested in the Department by ARS 45-408; that the plaintiff and its predecessors in interest have for many years prior to the filing of this action irrigated their farm lands and used for domestic purposes the percolating water lying below the surface of their lands and have pumped such waters from wells on said land; that all of such waters are and have been used for the purpose of producing crops and for domestic purposes on the lands from which they have been pumped; that the plaintiff and its predecessors in interest have expended

large sums of money in the development of their lands and of these percolating waters for the beneficial and reasonable use of said lands for agricultural and domestic purposes.

III

That the supply of percolating water available to said lands is not unlimited; that in the said Sahuarita-Continental critical water area there are, in addition to the irrigated lands of the plaintiff, other irrigated lands owned by other persons which are also irrigated by the pumping of percolating waters from beneath the lands; that the total quantity of water pumped and beneficially used as aforesaid by the plaintiff is approximately 38,500 acre-feet annually; that in addition to this usage, the other landowners within said area are and have been for several years using an additional amount

of said percolating waters which the plaintiff, on information and belief, alleges to be approximately 15,000 acre-feet per year; that the annual recharge of water into this critical area is substantially less than the amounts so beneficially used for agricultural purposes, and the water table within said critical area is and has been for many years gradually lowering and the reservoir of supply has been gradually depleting.

IV

That in recent years the defendants, either directly or through agents, subsidiaries, or lessees, have acquired well sites in the said critical area and are pumping substantial amounts of water from under the lands in said critical water area and are using such waters so pumped outside the said critical water area on lands other than from which the waters

are being pumped; that the present usage of all of the defendants in this regard the plaintiff alleges, on information and belief, to be approximately 25,000 acre-feet per year as of this time; further, on information and belief, the plaintiff alleges that the defendants propose and intend to continue the use of water pumped from said critical water area in the manner in which they are now doing, and to increase such pumpage in the future substantially beyond the amounts now being used.

Subsequent to the filing of this action and prior to this amendment AMAX COPPER MINES, INC., acquired an ownership interest in the property and operations of defendants THE ANACONDA COMPANY and BOYD LAND AND CATTLE COMPANY herein complained of by FARMERS INVESTMENT COMPANY and thereafter formed a general partnership

consisting of THE ANACONDA COMPANY and AMAX COPPER MINES, INC., under the name and style of ANAMAX MINING COMPANY, a partnership; upon information and belief plaintiff alleges that the said partnership is now the operating entity carrying on the mining, milling and water pumping and transportation activities which plaintiff has described and of which plaintiff made complaint in the pleadings and proceedings heretofore filed. Upon information and belief plaintiff alleges said defendants AMAX COPPER MINES, INC. and ANAMAX MINING COMPANY succeeded to an interest and ownership in the property and operations of THE ANACONDA COMPANY as aforesaid with notice of and subject to plaintiff's claims and this pending litigation and the proceedings, discovery and rulings heretofore made herein.

V

That the use by the defendants of these percolating waters is unreasonable and in violation of the rights of the plaintiff; that the plaintiff has been and will be irreparably injured and damaged by the continued withdrawal and transportation of the ground waters of the Sahuarita-Continental critical water area to be used on lands other than those from under which said waters were taken; that because of the taking of these waters by the defendants, the percolating waters under the plaintiff's lands are being depleted and, if the use by the defendants continues, will be exhausted, or lowered to the point that it is economically unfeasible to irrigate the plaintiff's lands and the same will no longer be adaptable for agricultural use and said lands will revert

to barren, desert land unless this Court by injunction permanently enjoins the defendants and each of them from the usages now being made of the said percolating waters within the Sahuarita-Continental critical water area.

VI

That, on information and belief, the defendants, and each of them, contend that they have the right to use the waters pumped from under the Sahuarita-Continental critical water area on lands other than from which they are pumped and contend that they have the right to continue and to extend such use in the future; that the plaintiff contends that such use and proposed use is in violation of the property rights of the plaintiff.

WHEREFORE, plaintiff prays as follows:

1. That this Court enter its judgment permanently enjoining the defendants,

and each of them, from taking the waters from beneath lands in the critical water area within which the plaintiff's lands are situated and using said water on other lands than those from which the waters have been taken; and

2. That this Court enter its judgment enjoining the defendants, and each of them, from continuing to pump waters from the wells now owned or controlled by them in the Sahuarita-Continental critical water area other than such waters as may be reasonably used upon the lands upon which said wells are located; and

3. That this Court enter a decree declaring and adjudicating the rights of the respective parties in and to the waters underlying the Sahuarita-Continental critical water area and underlying the respective lands of the parties; and

4. For such other and further relief

as to the Court may seem just and equitable in the premises.

COUNT TWO

I

Plaintiff is an Arizona corporation, the owner and farmer of approximately 6500 acres of agricultural land located within the Sahuarita-Continental Critical Groundwater Area in what is commonly known as the Upper Santa Cruz Valley, Pima County, Arizona. The Sahuarita-Continental Critical Groundwater Area (hereinafter designated as "Critical Groundwater Area") was designated and established as a Critical Groundwater Area pursuant to Article 7, Chapter 1, State Water Code, as amended, (Sections 45-301 et seq. A.R.S.) commonly known as the Ground Water Code, by the Arizona State Land Department and the lawful Commissioner thereof, on October 14, 1954, and continues

as such Critical Groundwater Area to the date hereof.

II

Defendants THE ANACONDA COMPANY (hereinafter "ANACONDA"), AMERICAN SMELTING & REFINING COMPANY (hereinafter "ASARCO"), DUVAL CORPORATION (hereinafter "DUVAL"), PIMA MINING COMPANY (hereinafter "PIMA"), BOYD LAND AND CATTLE COMPANY (hereinafter "BOYD"), DUVAL SIERRITA CORPORATION (hereinafter "SIERRITA"), and AMAX COPPER MINES, INC. and THE ANACONDA COMPANY as members of and constituting AMAMAX MINING COMPANY, a partnership (hereinafter "AMAMAX"), are each (except as to AMAMAX which is a partnership as described in Count One) corporations doing business in the State of Arizona and the County of Pima; defendant THE STATE LAND DEPARTMENT is a Department of the State of Arizona and is empowered under law to administer all

laws relating to lands owned by and under the control of the State of Arizona; that defendant ANDREW L. BETTWY is the duly appointed, qualified and acting State Land Commissioner of the State of Arizona and as such is the executive officer of the State Land Department and empowered and required under law to exercise and perform all powers and duties vested in or imposed upon the State Land Department, or upon the State Land Commissioner, including the general control and supervision of the waters of the State, both appropriable and ground water, and the distribution thereof.

III

That for many years prior to the filing of this action plaintiff has irrigated its farm lands from percolating water pumped from wells on its said land, said percolating water underlaying the

land, for the purpose of producing crops grown thereon and for domestic purposes, and has expended large sums of money in the development of the percolating waters for the beneficial and reasonable use of said land for agricultural and domestic purposes.

IV

That the supply of water available to the land is not unlimited but said supply is limited and the farm properties referred to herein lie within what is commonly known as the Sahuarita-Continental Critical Groundwater Area as established by order of the State Land Commissioner on October 14, 1981, pursuant to Article 6.1 7, Chapter 2, State Water Code, as amended (Sections 45-301 et seq. A.R.S.), commonly known as the Ground Water Code.

V

That there are approximately 15,000 acres of agricultural crop land within the

Critical Groundwater Area of which approximately 6500 acres belong to and have been farmed and are being farmed by plaintiff. The sole source of water for irrigation of said farm lands in cropping the same is the supply of ground water underlaying the land in said Critical Groundwater Area. In farming the aforesaid lands the farmers thereof have withdrawn water from said groundwater supply since the Critical Groundwater Area was established as aforesaid pursuant to and in conformity with the limitations and requirements of the Ground Water Code (Sections 45-101 et seq. A.R.S.). This withdrawal of ground water for agricultural purposes has in the past exceeded and now exceeds the annual recharge thereto by a substantial amount. The supply of ground water available for beneficial consumptive use upon the lands

in said critical area has been and presently is inadequate tc meet such needs without withdrawing or "mining" stored water in the underground of the critical area and thereby further lowering the water table and further depleting the supply available for future requirements of the critical area.

VI

The defendants ANACONDA, ASARCO, DUVAL, SIERRITA, PIMA and ANAMAX have acquired certain well sites within the Critical Groundwater Area and are presently pumping ground water subjacent to and underlaying the Critical Groundwater Area and are transporting the same for use and are using the same outside of said Critical Groundwater Area. Said defendants are presently so pumping and transporting ground water out of said critical area in an amount substantially

in excess of 50,000 acre feet per year. Some of said defendants are presently drilling additional wells within said critical area for the purpose of enlarging their withdrawal of ground water from said supply and transporting the same for use outside the boundaries of said critical area and all of said defendants, plaintiff is informed and believes and therefore alleges, contemplate and intend to continue and enlarge their present illegal withdrawals and usage from said Critical Groundwater Area.

VII

Prior hereto the State Land Department and the then State Land Commissioner granted to the following defendants the rights of way over state lands as hereinafter described for the purpose of laying therein pipelines to enable such defendant to transport ground water

withdrawn from the ground water supply underlaying the land within the aforesaid Critical Groundwater Area for use outside said area, as follows:

ASARCO

Right of Way No. 2232

Township 16 South, Range 13 East:

Across the top of Sections 32, 33 and 34 (South 30 feet of North 130 feet)

PIMA

Right of Way No. 1297

Township 17 South, Range 13 East:

Across the top of the West half of the West half of Section 1 and all of Sections 2, 3, 4 and 5 (the North 100 feet)

Right of Way No. 4352

Township 17 South, Range 13 East:

Across the bottom of the South-west quarter of Section 2 and then extending 330 feet West into Section 3 (South 100 feet)

Right of Way No. 4275

Township 17 South, Range 13 East:

Across the bottom of the South-
east quarter of Section 5 and
extending 200 feet East into
Section 4 (South 100 feet)

ANACONDA - ANACONDA-ANAMAX

Right of Way No. 3858

Township 17 South, Range 13 East:

Across the top of the North-
east quarter of Section 34
(North 400 feet)

DUVAL AND SIERRITA

Right of Way No. 4517

Township 19 South, Ranges 12 and
13 East:

Range 13 East:

Section 31: Through the North
half of the Northeast quarter

Section 30: Through the South-
east quarter; the East half of the
Southwest quarter; the Southeast quar-
ter of the Northwest quarter and
the West half of the Northwest
quarter

Range 12 East:

Section 24: Through the East
half and the Northwest quarter

Section 25: Through the Northwest quarter of the Northwest quarter

Section 13: Through the Southwest quarter of the Southwest quarter

Section 14: Through the East half of the Southeast quarter and through the North half.

In addition the State Land Department and the said State Land Commissioner granted to a corporation, Duval Sulphur & Potash Company, a right of way across the south 100 feet of Sections 8 and 9, Township 18 South, Range 33 East for a water line which plaintiff is informed and believes and therefore alleges is being used by defendant DUVAL for its illegal transportation of ground water as hereinbefore alleged.

Each of the above designated defendants utilizes its pipeline and right of way from the State Land Department and the said State Land Commissioner across state land in illegally transporting the

water withdrawn by such defendant from the ground water underlaying the aforesaid Critical Groundwater Area for use by said defendant outside said critical area.

VIII

Plaintiff and its lands and investments has been, is being, and will be in the future irreparably injured and damaged by the illegal withdrawals and transportation of ground water subjacent to its lands and other lands in said critical area by defendants in that defendants thereby further deplete and use up a water supply presently and heretofore inadequate for the proper and useful husbandry of its lands and which is and will be irreplacable. The acts of defendants constitute continuing illegal diversion of the ground water supply of the area and a continuing trespass upon the property

rights of plaintiff and other land-owners in the Sahuarita-Continental Ground-water Critical Area in and to the avail-able ground water supply as the same ex-isted when the critical area was estab-lished in 1954.

IX

Plaintiff has no plain, speedy or adequate remedy at law in that plain-tiff's water supply will be irrevocably and permanently damaged and its rights thereto subjected to a continuing trespass by defendants and each of them.

X

Plaintiff asserts against all defendants jointly and severally the right to relief prayed herein in respect of and arising out of the same series of trans-actions and occurrences and questions of fact and law common to all defendants will arise in the action.

WHEREFORE, plaintiff prays judgment against defendants and each of them adjudging that the issuance of the rights of way hereinbefore described to defendants ANACONDA, DUVAL, PIMA, ASARCO and SIERRITA by the State Land Department and its Commissioner (and the use thereof by ANAMAX), was and is for an illegal use and enjoining further uses of their respective pipelines by the said defendants for use in transporting ground water out of said Critical Groundwater Area and enjoining the State Land Department and Andrew L. Bettwy as State Land Commissioner from permitting such use by said defendants to continue and directing that he forthwith cancel and abrogate the rights of way aforesaid and require the removal thereof by each defendant as to the pipeline installed and used by such defendant; and

For such other and further relief as may be equitably required to preserve and protect the rights of plaintiff.

COUNT THREE

I

FARMERS INVESTMENT COMPANY (hereinafter "FICO") incorporates herein by reference paragraphs I, II, III and IV of Count One herein.

II

That in recent years the defendants, either directly or through agents, subsidiaries, or lessees, have acquired well sites in the said critical area and are pumping substantial amounts of water from under the lands in said critical water area and are using such waters so pumped outside the said critical water area on lands other than from which the waters are being pumped; that the [illegible] use

of all of the defendants in this regard the plaintiff alleges, on information and belief, to be approximately 55,000 acre-feet per year as of this time; further, on information and belief, the plaintiff alleges that the defendants propose and intend to continue the use of water pumped from said critical water area in the manner in which they are now doing, and to increase such pumpage in the future substantially beyond the amounts now being used.

III

Defendants and each of them, have wrongfully taken and used water from the underground storage and reservoir of the Critical Groundwater Area designated as hereinbefore alleged and have thereby become unlawfully and unjustly enriched to the injury and financial damage and loss of FICO. Defendants are obliged to account to FICO to the extent they have

been and will be unjustly enriched through their past and continuing wrong and injury to FICO.

IV

The unlawful and wrongful withdrawal and utilization by defendants from the ground water reservoir and basin of the Critical Groundwater Area aforesaid has caused and will continue in the future to cause FICO loss and expense because of the depletion of the ground water supply with a consequent lowering of the ground water table thereby requiring that FICO lower its pump bowls, deepen its wells and in some instances construct replacement wells. The added pump lift of the ground water from the lowered ground water table has and will cause FICO added and additional expense in costs in power costs and labor and maintenance of its wells and installations to FICO's damage in

excess of $10,000,000.00.

V

The wrongful continued withdrawal and utilization of ground water by defendants from said critical area, as herein complained of, has permanently depreciated the fair market value of FICO's property and lands, hereinbefore described, to FICO's damage in an amount in excess of $50,000,000.00.

VI

The conduct of defendants, and each of them, as herein alleged and as set forth in FICO's complaint now on file, constitutes an intentional gross wrong to FICO, continuing in character, justifying the imposition of punitive damages. Said defendants and each of them are corporations of great wealth.

VII

The claims set forth in this complaint, as amended, are stated as separate

claims and as alternative claims where inconsistent claims are stated. The actions and conduct of defendants resulting in the wrongs herein complained of by FICO are interrelated and the injuries and wrongs inflicted upon FICO flow from said interrelated wrongful conduct of defendants. The sums stated as admeasuring the damage and loss to FICO due to wrongful actions of defendants are approximations and estimates which FICO will amend as discovery is completed.

WHEREFORE, as to this count FICO prays judgment for:

1. An accounting from each defendant as to the profits and gains realized and achieved by each defendant from its wrongful invasion of and use of the underground water supply and resources of FICO.

2. An amount adequate to compensate FICO for the added expenses, costs and

expenditures which have been or will be required because of the lowering of the water table under FICO's farm lands in excess of $10,000,000.00;

3. The amount by which the defendants' various trespasses have or will lessen the fair market value of FICO's property estimated at in excess of $50,000,000.00;

4. As to each defendant a proper sum as exemplary damages estimated as to each defendant at in excess of $10,000,000.00;

5. For such other and further relief as justice may require.

(Signed SNELL & WILMER by Mark Wilmer, Attorneys for Plaintiff)

* * *

(TITLE OF ACTION)

ANSWER OF AMAX COPPER MINES, INC., THE ANAMAX MINING COMPANY AND THE ANACONDA COMPANY TO PLAINTIFF'S AMENDED COMPLAINT OF NOVEMBER 8, 1973 AND COUNTER-CLAIM

Filed: November 19, 1973

Comes now the defendants THE ANACONDA COMPANY, and AMAX COPPER MINES, INC. as partners in and constituting the ANAMAX MINING COMPANY and for their answer to plaintiff's amended complaint filed November 8, 1973 state:

COUNT ONE

I.

That these defendants admit Paragraph I of plaintiff's amended complaint.

II.

That these defendants are without knowledge or information sufficient to

form a belief as to the truth of the allegations contained in Paragraph II of plaintiff's amended complaint, except the allegation that plaintiff is making reasonable use of said lands for agricultural and domestic purposes and these defendants deny said allegation.

III.

That in answer to Paragraph III of plaintiff's amended complaint, these defendants admit that the supply of percolating water available to land in Santa Cruz Valley is not unlimited; these defendants further admit that in the Sahuarita-Continental critical groundwater area, there are in addition to the irrigated lands of the plaintiffs other irrigated lands owned by other persons which are also irrigated by the pumping of percolating waters from beneath the land; these defendants further admit that the water

in the described area has been for some time gradually lowering and that the reservoir of supply has been gradually depleting; that these defendants are without knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph III of plaintiff's amended complaint.

IV.

This defendant is without knowledge or information sufficient to form a belief as to the truth of allegations of Paragraph IV relating to the acts and conduct of other defendants except the defendant BOYD LAND AND CATTLE COMPANY, INC.; this defendant denies that in recent years it has acquired well sites in the critical area described in Paragraph IV of plaintiff's complaint; they admit that it has acquired irrigated lands and other lands for the purpose of using said

water for milling and industrial purposes; these defendants admit that water is pumped from its land in said critical area for its use at a site located outside said critical water area; these defendants allege that a substantial quantity of the water so used is returned to said critical water area; these defendants are without knowledge or information sufficient to form a belief as to the allegation contained in Paragraph IV of plaintiff's complaint, that the present usage of all defendants in regard to matters alleged in paragraph IV of plaintiff's complaint, is approximately 25,000 acre feet per year; these defendants admit that it will continue to use water for the purposes above stated but alleges that any increase in the amount so provided over the amount currently pumped will depend upon economic and other considerations not known to these defendants at this time.

These defendants admit the matters

stated in the second or last paragraph of section IV of Count I.

V.

That these defendants deny the allegations of Paragraph V of plaintiff's amended complaint.

VI.

That in answer to Paragraph VI, these defendants admit that they contend they have the right to use the water pumped from under the Sahuarita-Continental critical water area at locations other than from which they are pumped and that these defendants contend that they have the right to continue and extend said use in the future; these defendants admit that the plaintiff contends that such use and proposed use is in violation of the property rights of plaintiff, but deny that plaintiff's contention is valid.

VII.

That these defendants deny all allegations of the plaintiff's amended complaint not admitted herein.

FIRST AFFIRMATIVE DEFENSE

For their first affirmative defense, defendants allege that plaintiff has been guilty of laches in bringing plaintiffs claims against these defendants and is, therefore, not entitled to equitable or other relief.

SECOND AFFIRMATIVE DEFENSE

That these defendants have a property right in and to any percolating water underneath its land, that to deprive defendants of making reasonable and necessary use of said percolating water would deprive defendants of their right to due process of law pursuant to Article 2, Section 4 of the Constitution of the State of Arizona, and would deprive defendants

of protection pursuant to Article 2, Section 17, of the Constitution of Arizona to not have their property taken for private use and would deprive defendants of their property without due process of law and deny defendants the equal protection of the law guaranteed by the 14th Amendment to the Constitution of the United States, and would deny defendants equal privileges and immunities guaranteed to them by Article 2, Section 13 of the Constitution of the State of Arizona.

COUNT TWO

I.

That these defendants admit Paragraph I of Count Two.

II.

That these defendants admit the allegations of Paragraph II, except the allegations that the State Land Commissioner has general control of the waters of the

State, both appropriable and groundwater and the distribution thereof and this defendant denies r t allegation.

III.

That these defendants are without knowledge or information sufficient to form a belief as to the truth of allegations therein, except the allegation that the plaintiff has developed percolating waters for the beneficial and reasonable use of said land for agricultural and domestic purposes and this allegation is denied.

IV.

That these defendants admit the allegation of Paragraph IV, Count Two.

V.

That these defendants admit the third sentence of Paragraph V and denies the remaining allegations thereof.

VI.

That these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of the activity of other defendants, except that of BOYD LAND AND CATTLE COMPANY, INC.; deny that this defendant acquired well sites; these defer ants admit that they have acquired lands and irrigated land and have withdrawn such lands from irrigation and other use and are using said water for the purpose of milling and industrial uses; alleges that these defendants are without knowlege or information sufficient to form a belief as to the truth of the other allegations of Paragraph VI, except that allegation that these defendants withdrawal is illegal and these defendants deny that allegation.

VII.

That these defendants admit that right of ways were granted over the real property described in Paragraph VII to the parties described as holders of said rights of way; these defendants deny remaining allegations of Paragraph VII.

VIII.

That these defendants deny Paragraphs VIII, IX and X of Count Two of plaintiff's amended complaint.

COUNT THREE

I.

That these defendants deny that they acquired well sites as such for the purpose of extracting groundwater; these defendants allege they acquired irrigated lands and other lands for the purpose of using said water for industrial purposes; these defendants are without knowledge or information to form a belief as

to the truth of the allegations as to the amount of water being pumped by defendants from the area described in Paragraph II of Count Three of plaintiff's amended complaint of November 8, 1973; these defendants admit they intend to use water pumped from the critical water area in the manner they are presently doing and allege that any increase in usage in the future depends upon economic and other considerations not now known to these defendants.

II.

That these defendants deny paragraphs III, IV, V and VI of Count Three of plaintiff's amended complaint.

III.

That these defendants admit the first sentence of Paragraph VII; deny the remaining allegations of Paragraph VII.

WHEREFORE, these defendants pray as

follows:

1. That the plaintiff take nothing.

2. That this Court enter its order decreeing that these defendants have the right to make the use of any percolating water under this land that they now make and propose to make in the future.

3. For defendants costs herein expended and for such other and further relief as to this Court seems proper.

(Signed CHANDLER, TULLAR, UDALL & RICHMOND by Thomas Chandler, Attorneys for Defendants The Anaconda Company, Amax Copper Mines, Inc. and The Amax Mining Company)

COUNTERCLAIM

The defendant THE ANACONDA COMPANY, a corporation, AMAX COPPER MINES, INC., a corporation, and AMAX MINING COMPANY, a partnership, for their counterclaim against plaintiff states:

I.

That defendant partners are corporations authorized to transact business in the State of Arizona.

II.

That defendants are the owners of land located in the Santa Cruz Valley south of the City of Tucson, Arizona; that plaintiff's lands are located within the Sahuarita-Continental critical water area so designated by State Land Department on October 14, 1954, pursuant to authority vested in the Department by A.R.S. 45-181; that said land was acquired for the purpose of using percolating water lying below the surface of said land for milling and other industrial uses; that defendants have expended large sums of money in acquiring and developing its lands and the percolating waters above referred to are put to a beneficial and

reasonable use for mining, milling and industrial uses.

III.

That the supply of percolating water available to said land is not unlimited; that the water table within the basin above referred to is and has been for many years gradually lowered and the reservoir of supply is gradually depleting; that plaintiff owns and operates a farm of substantial acreage near and in the vicinity of the land owned by defendants; that plaintiff uses a substantial amount of the percolating water for the purpose of irrigation and other purposes in connection with the operation of its farm.

IV.

That the use by the plaintiff of these percolating waters is unreasonable and in violation of the rights of defendants in that the water is being wasted

by the plaintiff and plaintiff is not utilizing reasonable methods of conservation to conserve said water; that defendants will be irreparably injured and damaged by the continued withdrawal and continued waste by plaintiff of the groundwaters of the Sahuarita-Continental critical water area; that because of the taking and wasting of these waters by plaintiff, the percolating waters under defendants lands are being depleted and if the use by plaintiff continues, said water will be exhausted or depleted to the point that it creates great economic hardship upon defendants to the extent that it may no longer be practical for defendants to make the use they desire to make of the percolating waters, unless this Court by injunction permanently enjoins plaintiff from wasting said water.

V.

That upon information and belief the plaintiff intends to continue to use the water in the manner hereinabove described; that plaintiff contends it has a right to so use the water and defendant contends that plaintiff has no such right to waste the water in violation of the property rights of defendants.

(Signed CHANDLER, TULLAR, UDALL & RICHMOND by Thomas Chandler, Attorneys for Defendants The Anaconda Company, Asak Copper Mines, Inc., and the Anamax Mining Company)

* * *

(TITLE OF ACTION)

MOTION FOR SUMMARY JUDGMENT
AS TO DUVAL CORPORATION AND
DUVAL SIERRITA CORPORATION

Filed: January 15, 1974

FARMERS INVESTMENT COMPANY, plaintiff, (hereinafter "FICO"), moves the Court for an order granting FICO summary judgment determining that the withdrawal and transportation by DUVAL CORPORATION and DUVAL SIERRITA CORPORATION (hereinafter "DUVAL") of groundwater from the groundwater basin underlying the Sahuarita-Continental Critical Groundwater Area and the transportation thereof to the mills and mines of said defendants outside of said Critical Area is illegal and a wrongful trespass as to FICO; and enjoining said defendants from continuing such illegal and wrongful

withdrawal and transportation of groundwater from the Critical Area.

This Motion is upon the grounds:

1. It is undisputed in the evidence that the Sahuarita-Continental Critical Groundwater Area is a duly designated critical groundwater area designated as such by the State Land Commissioner, pursuant to the provisions of the Arizona Groundwater Code and specifically Section 45-568 et seq., A.R.S., on October 1, 1984, which designation has remained in full force and effect at all times material hereto.

2. FICO, at all times material hereto, has owned and farmed to agricultural crops in excess of 5,000 acres of land within this critical groundwater area and has required and used and continues to require and use groundwater withdrawn from the groundwater basin underlying

said critical area for the irrigation and growing of said farm crops.

3. Defendants DUVAL are engaged in mining an ore body lying westerly from and outside this critical groundwater area and in milling the ore so mined, for which purpose the DUVAL defendants each maintain a mill in the general area of their mine and outside of the Sahuarita-Continental Critical Groundwater area.

4. Heretofore and before the filing of this action, DUVAL acquired well sites within the Sahuarita-Continental Critical Groundwater Area and drilled water wells therein and equipped said wells with pumps and sources of energy to operate the same, and connected the discharge from said wells to a transportation facility whereby the groundwater pumped from the said groundwater basin is transported by pipeline outside of said critical

area to the mine and mills of DUVAL a distance of approximately seven miles, where the groundwater is used in connection with the mining and milling business of DUVAL. Amounts of groundwater in excess of 13,000 acre feet per year have been pumped to the mine and mills of DUVAL and are presently so pumped and transported by DUVAL.

5. DUVAL proposes to and will continue to illegally and wrongfully withdraw groundwater from said underground basin and transport the same outside of said basin for use by DUVAL in its mining business unless enjoined by the Court, to the irreparable loss and damage of FICO.

The following exhibits are filed herewith:

1. Exhibit A, which is Plate 1, Bulletin 1113, United States Geological Survey, which illustrates the area

involved and locates thereon through means of a transparent overlay the general location of the mine, mills and tailings ponds of the DUVAL defendants. (The copies of this Plate 1 served upon the DUVAL defendants show the physical location of the DUVAL mine and mills by actual drawing on the Plate itself. The copies provided these defendants are hand-colored duplicates of Plate 1 from Bulletin 111? due to the fact that additional copies of Plate 1 itself are not available. The Court copy is filed with the overlay in place and affixed to a supporting board.) The accuracy of the placement of the DUVAL installations is verified by the affidavit of John P. Erickson, and the accuracy and acceptability of Plate 1 as fairly demonstrating the topography and general conditions of the area is verified by the affidavit of M. L.

Brashears.

2. Photographic exhibits 1 through 5 are photographs of the area showing the general location of the mills of the DUVAL defendants in relation to the well sites of these defendants and FICO's growing crops. The accuracy of these photographs is verified by the affidavits of Warren L. Culberson, who participated in the helicopter flight during which those pictures were taken.

The Motion is based upon the records, files and discovery materials herein, the attached exhibits and affidavits, and the Memorandum of Points and Authorities following.

(Signed) GRILL & WILMER by Mark Wilmer, Attorneys for Plaintiff)

MEMORANDUM OF POINTS AND AUTHORITIES

If ever there was a case to which the characterization Justice Oliver Wendel Holmes gave to Sanitary District of Chicago applies, it is the case at bar. Justice Holmes might well have been writing of this case when he described the issues in Sanitary District of Chicago v. United States, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352, 352. Justice Holmes wrote:

> This brief summary of the pleadings is enough to show the gravity and importance of the case. It concerns the expenditure of great sums and the welfare of millions of men. But cost and importance, while they add to the solemnity of our duty, do not increase the difficulty of decision except as they induce arguments upon matters that, with less mighty interests, no one would venture to dispute. The law is clear, and when known, the material facts are few.
> (Emphasis added).

In this case also, "[t]he law is clear . . .

the material facts are few."

In Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385 (1969), the City of Tucson was engaged in pumping groundwater from the groundwater basin of a duly designated critical groundwater area, the Marana Critical Ground Water Area, for use outside that critical area. The Arizona Supreme Court said:

> "That these lands are within a Critical Ground Water Area is alone sufficient to grant petitioners the relief sought since a Critical Ground Water Area is a ground water basin or a subdivision thereof 'not having sufficient ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal.' A.R.S. Sec. 45-301. Manifestly, a ground water area or subdivision of a basin which does not have a reasonable safe supply for the existing users can only be further impaired by the addition of other users or uses." 104 Ariz. at 531 (Emphasis added).

The Court further said, after discussing Tucson's projected water withdrawal plans (p. 530), "Tucson's action is clearly illegal."

Tucson had argued that the farmer should be relegated to his "inverse eminent domain" remedy. The Supreme Court commented with respect to this argument:

> "We said in State v. Ahway, supra, that because of the pronouncements in Howard v. Perrin, supra, and Maricopa County Municipal Water District et al. v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369, that the doctrine of reasonable use '* * * is a rule of property, * * *.' By Art. 2 Sec. 17 of the Constitution of Arizona '* * * No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner. * * *.' We think this language of the Constitution is clear and unambiguous, needs no interpretation and means exactly what it says. Hence, assuming that Tucson can exercise the power of eminent domain to

> condemn rights in percolating water, a point we do not decide, compensation must be first paid to the petitioners or into court on their behalf." 104 Ariz. at 531.

The Court also summarily disposed of claims of estoppel as follows:

> "We do not think these allegations raise an estoppel. Petitioners were sufficiently concerned to engage attorneys to meet and confer with Tucson. Thereafter, the legal rights were as apparent to Tucson as to petitioners. Silence does not operate as an estoppel where the means of knowledge is equally available to both parties. [illegible] Realty Co. v. [illegible], [illegible] Md. [illegible], [illegible] A. [illegible], 76 A.L.R. [illegible]; Anno. [illegible], [illegible]. Estoppel by silence cannot be invoked by one who knows the true character of his own title. Certainly, petitioners were under no duty to protect Tucson by advising it as to what its legal rights were. To make the silence of a party operate as an estoppel, there must have been a duty to speak. Ray v. First National Bank of Arizona, [illegible] Ariz. 337, 356 P.2d 591. Remaining passive and silent does not deprive a person of his legal rights. In

addition there must be some act to induce or encourage another to alter his position. Grant County Deposit Bank v. Greene, 6 Cir., 200 F.2d 835." 104 Ariz. at 532.

The second Jarvis decision, Jarvis v. The State Land Department, 106 Ariz. 506, 479 P.2d 169 (1970), emphasized the clear holding of Jarvis I that pumping and removal of ground water from a critical groundwater area would not be countenanced by Arizona Courts. The Court first stated the controversy for decision:

> "Petitioners in the present action now assert that the City of Tucson, although not transporting water to Tucson proper, has continued to pump water from its wells and has conducted water to areas both within and without the Marana Critical Ground Water Area in violation of the Court's injunction. Tucson acknowledges that it is pumping water from its wells and is delivering water to an installation known as Ryan Field within the Marana Critical Ground Water Area and to certain residences outside the Marana

Critical Ground Water Area but within the Avra-Altar Valleys' drainage area. Several questions which it is believed pertinent have been propounded by petitioners in order that there be a final disposition of the dispute between the parties." 106 Ariz. at 508 (Emphasis added).

The Court then commented:

> "Tucson questions whether it may pump water from its wells and transport the water so pumped through its pipelines to lands which lie within the watershed but outside the Marana Critical Ground Water Area. From what has been said concerning the American rule of reasonable use, the answer to Tucson's question is, of course, that it may not." 106 Ariz. at 511.

The Court then explained its holding and the reasons for so holding:

> "We also pointed out in our first decision in this case that the Avra-Altar Valleys are a part of a critical water area, being included within the Marana Critical Ground Water Area. For the reason that a critical ground water area is a ground water basin or subdivision 'not having sufficient ground water

> to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal,' we held that additional users would necessarily deplete the supply of the existing users. Consequently, the conveyance of ground waters off the lands on which wells in the Avra Valley are located impairs the supply of the other land owners within the critical area." 106 Ariz. at 501.

Tucson argued that since the statute (A.R.S. 45-101 et seq.) only prohibited new irrigation or drainage wells having a capacity of more than 100 gallons per minute, the Legislature must have intended to permit pumping for municipal purposes without restriction. The Court answered this argument:

> ". . . But the illegality of the use of ground water is not dependent upon whether the Legislature has not forbidden the sinking of wells as a source of supply to be used for municipalities. The right to exhaust the common supply by transporting water for use

> off the lands from which they are pumped is a rule of law controlled by the doctrine of reasonable use and protected by the constitution of the state as a right in property." 106 Ariz. at 509-10. (Emphasis added)

The Court then dealt with the delivery of water by Tucson to Ryan Field, located within the critical area, and also with the delivery by Tucson of water to residences outside of the boundary of the critical area but within the watershed or drainage area tributary to the critical area water basin, saying:

> "Tucson questions whether on equitable principles it should be prohibited from delivering water to Ryan Field. Ryan Field is an airfield which we understand has existed at least as long as petitioners have engaged in agriculture. Its lands overlie the Avra-Altar water basin and geographically it lies within the Marana Critical Ground Water Area so as to entitle it to withdraw water from the common supply for all purposes except agriculture. Tucson should not be prohibited from delivering

> water to Ryan Field for lawful purposes since the Ryan Field supply is from the common basin over which it lies and from which it could legally withdraw water by sinking its own wells for domestic purposes."
>
> "Tucson's delivery of water to purchasers within the Avra-Altar drainage area but outside the Marana Critical Ground Water Area is, however, without equitable sanction. There is no indication in the record that these customers of Tucson overlie the water basin so as to come within the principle applicable to Ryan Field. Until Tucson can establish that its customers outside the Marana Critical Ground Water Area but within the Avra-Altar Valleys' drainage areas overlie the water basin so as to be entitled to withdraw water from it, there are no equities which will relieve it of the injunction heretofore issued." 105 Ariz. at 510.

It should be finally noted that the only reason for allowing Tucson to purchase agricultural lands within the critical area and withdraw and use the amount of water historically consumed by agriculture on the purchased land was because

A.R.S. Sec. 45-147 established water use priorities for appropriable water, giving domestic and municipal uses priority over irrigation and stock watering. Section 45-147 reads as follows:

> "Sec. 45-147. Relative value of uses
>
> A. As between two or more pending conflicting applications for the use of water from a given water supply, when the capacity of the supply is not sufficient for all applications, preference shall be given by the department according to the relative values to the public of the proposed use.
>
> B. The relative values to the public for the purposes of this section shall be:
>
> 1. Domestic and municipal uses. Domestic uses shall include gardens not exceeding one-half acre to each family.
>
> 2. Irrigation and stock watering.
>
> 3. Power and mining uses.

Power and mining uses possess no such priority over irrigation uses as the

statute gives domestic and municipal uses; the contrary is the case.

The location of DUVAL'S mills is plainly well outside the boundary of the Sahuarita-Continental Critical Groundwater Area as appears from Exhibit A. There is no dispute as to the fact that DUVAL'S wells are within the critical area and that the water is there withdrawn and transported for use outside of the critical area. Photographic exhibits 1 - 5 demonstrate the physical facts which bring DUVAL within the Supreme Court condemnation of Tucson's water use as stated in Jarvis I: "Tucson's (DUVAL'S) action is plainly illegal".

(Signed SHELL & WILMER by Loren W. Counce and Mark Wilmer, Attorneys for Plaintiff)

* * *

(TITLE OF ACTION)

AFFIDAVIT OF JOHN R. ERICKSON RE OVERLAY, PLATE 1, BULLETIN 1112, U.S.G.S. (EXHIBIT A)

(Attached to foregoing Motion for Summary Judgment and made part thereof)

(Venue)

JOHN R. ERICKSON, being first duly sworn, says:

Affiant is a registered professional engineer in the State of Arizona and other states, and has been employed in a professional capacity in relationship to the case of Farmers Investment Company, Plaintiff, vs. The Anaconda Company, et al., Defendants, Cause #116542 in the Superior Court of Pima County, Arizona, since 1959.

The overlay to Exhibit A (Plate 1,

Bulletin 1112, U.S.G.S.) filed herein has been prepared under the direction of affiant. The boundaries of the Critical Groundwater Area depicted thereon are those established from the boundaries set in the order establishing the Sahuarita-Continental Critical Groundwater Area. The information upon this overlay showing the location of the mills, mining pits and tailings ponds of the various defendants in said cause in relation to the topography of the area and the boundary of the Sahuarita-Continental Critical Groundwater Area shown thereon, has been derived from discovery in said Cause #116542 and the information supplied by the various defendants in answer to discovery proceedings. Additionally, affiant has viewed the area many times, both from the air and ground, and has examined numerous aerial photographs of the area for the

purpose of confirming the locations as established, and through which he has acquired intimate knowledge of the location of the various installations of the defendants in relationship to the topography of the area. The overlay to Exhibit A above referred to and the matters and things shown thereon has been prepared in accordance with good engineering practices and is a reasonably accurate representation of the physical features depicted thereon and the location of each thereof.

Affiant has also supervised the reproduction of Exhibit A and the overlay to Plate I of Exhibit A as attached to the copies of FICO's Motion for Summary Judgment as to the Duval defendants; the reproduction shows with substantial accuracy the matters and things depicted on said exhibit, including the overlay

thereto.

Further affiant saith not.

(Signed JOHN R. ERICKSON before a Notary Public on January 15, 1974)

* * *

(TITLE OF ACTION)

AFFIDAVIT OF M. L. BRASHEARS

(Attached to foregoing Motion for Summary Judgment and made part thereof)

(Venue)

M. L. BRASHEARS, being first duly sworn says:

Affiant is a hydrogeologist and a principal partner in the professional partnership of Leggette, Brashears and Graham, Consulting Ground-Water Geologists, 551 Fifth Avenue, New York City, New York.

Affiant graduated from Massachusetts Institute of Technology with a degree of B.S. in Geology, and thereafter completed one year of graduate study in Geology at Massachusetts Institute of Technology.

After a short period of employment in private industry as an engineer, affiant became employed as a Ground-Water Geologist with the Ground-Water Branch of the U.S. Geological Survey, which employment continued from 1936 through 1952. During the last ten years of this employment, affiant was District Geologist in charge of ground-water investigations in New York and New England. Additionally, affiant acted as ground-water consultant to numerous federal, state and local agencies. Since 1952, affiant has been associated with the firm of Leggette, Brashears and Graham. During the period of his employment with the U.S.

Geological Survey and immediately following this, affiant published approximately eighteen papers related to ground-water and the geology of areas in which ground-water is found. Affiant has made field surveys of geological conditions in bedrock areas for the purpose of evaluation of ground water supply potential in most of the eastern states, and in Ohio, Washington, Arizona, California, Japan, Australia, Mexico, Puerto Rico, and Canada. Affiant is a charter member of the American Institute of Professional Geologists and of numerous professional societies and committees.

The firm of Leggette, Brashears and Graham has been responsible for numerous ground-water studies in the United States for private clients and public water agencies. Additionally, the firm has been employed in connection with water

matters in Australia, the Bahamas, Bolivia, Brazil, Canada, Cuba, Ethiopia, Jamaica, Mexico and in numerous other foreign projects. Affiant has been employed by Farmers Investment Company in connection with the above-entitled litigation and has become familiar with the area known as the Upper Santa Cruz Valley and has had numerous conferences with other professionals involved in geology, hydrology and water supply matters related to this litigation.

Affiant is familiar with the publication "Some Geologic Features of the Pima Mining District, Pima County, Arizona", U.S. Geological Survey Bulletin 1112-C, and with Plate 1, Bulletin 1112-C. Plate 1 is annexed to this Affidavit as Exhibit #1.

In addition to reviewing Plate 1 and the contents of Survey Bulletin 1112-C, affiant spent approximately two days in

the general area depicted by Plate 1 for the purpose of determining the accuracy, through personal inspection, of the findings made as to the geologic features of the area shown on Plate 1. Affiant has also viewed this area by aerial reconnaivance. The physical inspection which affiant made of the area, to the extent it was accessible through existing roads and other means of access, confirms the accuracy of the findings as to the geological features of the area as depicted on Plate 1.

As indicated in the statement of affiant's qualifications, affiant was employed as a Ground-Water Geologist by the U.S. Geological Survey from 1936 to 1952, and was District Geologist in charge of ground-water investigation in New York and New England during the last ten years of that employment.

Affiant is therefore familiar with the surveying techniques employed by the U.S. Geological Survey in the preparation of geological maps such as Plate 1. The geological information shown on Plate 1 is obtained through actual field surveying by an experienced geologist employing field techniques and instruments in general use and relied upon by the U.S. Geological Survey and other geolcgists. Geologists and others requiring information as to the type of geological formations to be found in an area customarily rely upon U.S. Geological Survey maps such as Plate 1 as their primary source of accurate information in matters of substantial importance. Information such as shown on Plate 1 is uniformly accepted as reliable by professional geologists within acceptable limits of tolerance for error.

Examination of Plate 1 and inspection of the area in which the Duval Sierrita-Esperanza mills are located discloses that those mills are located on a formation known as Granodiorite. Granodiorite is an igneous rock formation formed by gradual cooling and solidification of molten rock material while deep beneath the surface of the earth and ultimately thrust up to the surface of the earth many million years ago by forces not completely understood. The igneous rock upon which the Duval Sierrita-Esperanza mills are located forms the basement or bedrock at these sites. It is essentially impermeable. The area occupied by the Duval Sierrita-Esperanza pits is either igneous rock or related sedimentary rock, both of which are essential (sic) impermeable.

Further affiant saith not.

(Signed M. L. BRASHEARS before a Notary Public on December 17, 1973)

* * *

(TITLE OF ACTION)

AFFIDAVIT OF WARREN E. CULBERTSON

(Attached to foregoing Motion for Summary Judgment and made part thereof)

(Venue)

WARREN E. CULBERTSON, being first duly sworn says:

Affiant is general manager of the Sahuarita-Continental farm properties of Farmers Investment Company, the plaintiff in the above-entitled cause, located within the Sahuarita-Continental Critical Groundwater Area, and has held this

position for 13 years. Affiant is an experienced pilot and flies the company plane regularly in discharge of his duties, and by reason thereof has become very familiar with the topography of the Upper Santa Cruz Valley, including the area in which the mining and milling facilities of Duval Corporation and Duval Sierrita Corporation, defendants in the above-entitled cause, are located. Affiant has also become familiar with the location of the water wells and related facilities which are utilized by the Duval defendants in pumping and transporting water from within the Critical Groundwater area to their mining facilities for use in their mining and milling operations.

Affiant accompa[illegible] Herb McLaughlin and Mark Wilmer in a [illegible]copter flight over and around the area of the Duval mines and mills, and noted the height of

the helicopter in feet above mean sea level and its general orientation in relation to the mines and mills of these defendants, and the other geophysical facts stated in affidavits 1 through 5 annexed to the photographs bearing like exhibit numbers, at the time these photographs were taken by photographer Herb McLaughlin. Affiant has also examined the photographs numbered 1 through 5 and states that each is a fair representation of the view that the human eye would receive at like elevation and orientation with respect to the physical aspects of the topography of the area and the location of the mills of these defendants and under like light conditions. This helicopter flight was made on the 14th day of September, 1973.

Affiant has had occasion to overfly

this area regularly in the FICO plane on company business and the general conditions and physical facts as shown upon photographic exhibits 1 through 5 have remained essentially as shown in said photographs.

This affidavit is made for the purpose of permitting the facts verified herein to be incorporated by reference in exhibit photographs 1 through 5 and the affidavit attached to each exhibit describing and stating relevant physical facts appearing thereon.

Further affiant saith not.

(Signed WARREN E. CULBERTSON before a Notary Public on January 14, 1974)

* * *

SUPPLEMENTAL AFFIDAVIT
TO PHOTOGRAPHIC EXHIBIT 1

(Attached to foregoing Motion for Summary Judgment and made part thereof)

(Venue)

WARREN E. CULBERTSON, being duly sworn, upon his oath says:

Affiant makes this as a supplemental affidavit to the General Affidavit relating to the five photographs, exhibits 1 through 5. This affidavit relates to photographic exhibit 1.

This picture was taken at approximately 3300 feet elevation above mean sea level looking generally westerly to the location of the Duval mills. Point 1 indicates the Duval mills. Points 2 and 3 show the location of two FICO wells ser-

vicing the pecan groves in the southern portion of the FICO-Continental ranch, with the pecan grove lying between the two wells.

The distance from the helicopter location to the Duval mills is estimated at seven miles.

(Signed WARREN E. CULBERTSON before a Notary Public on January 14, 1974)

* * *

SUPPLEMENTAL AFFIDAVIT
TO PHOTOGRAPHIC EXHIBIT
2

(Attached to foregoing Motion
for Summary Judgment and made
part thereof)

(Venue)

WARREN E. CULBERTSON, being duly sworn, upon his oath says:

Affiant makes this as a supplemental affidavit to the General Affidavit relating to the five photographs, exhibits 1 through 5. This affidavit relates to photographic exhibit 2.

This picture was taken at approximately 3300 feet elevation above mean sea level looking generally westerly from over the south end of the FICO-Continental pecan groves toward the Duval mills, about seven miles distant. Point 1 indicates

the Duval mills. Point 2 indicates the pipe line from the Duval well to the Duval mills. Point 3 indicates the Duval pumping station. Point 4 indicates the Duval well. Point 5 indicates the Santa Cruz River bed. The pecan grove shown is the south end of the FICO property; W-1 is a FICO well.

(Signed WARREN E. CULBERTSON before a Notary Public on January 14, 1974)

* * *

SUPPLEMENTAL AFFIDAVIT TO
PHOTOGRAPHIC EXHIBIT 3

(Attached to foregoing Motion
for Summary Judgment and made
part thereof)

(Venue)

WARREN E. CULBERTSON, being duly sworn, upon his oath says:

Affiant makes this as a supplemental affidavit to the General Affidavit relating to the five photographs, exhibits 1 through 5. This affidavit relates to photographic exhibit 3.

This picture was taken near ground level looking northwesterly to the Duval mills over a Duval well and pump station on the Valley floor. Point 1 indicates the Duval mills. Point 2 indicates the Duval well, and Point 3 indicates

the Duval power for pumping station.

(Signed WARREN E. CULBERTSON
before a Notary Public on
January 14, 1974)

* * *

(TITLE OF ACTION)

SUPPLEMENTAL AFFIDAVIT
TO PHOTOGRAPHIC EXHIBIT
4

(Attached to foregoing Motion
for Summary Judgment and made
part thereof)

(Venue)

WARREN E. CULBERTSON, being duly sworn, upon his oath says:

Affiant makes this as a supplemental affidavit to the General Affidavit relating to the five photographs, exhibits 1 through 5. This affidavit relates to photographic exhibit 4.

This picture shows generally the location of the Duval mills in relation to the City of Tucson and the general topography of the area. The photograph was taken looking north-northeast at an

elevation of approximately 5000 feet above mean sea level. The mine pit lies generally westerly from the mill shown. The general location of the City of Tucson is indicated by Point 1 and the Duval mills by Point 2.

(Signed WARREN E. CULBERTSON before a Notary Public on January 14, 1974)

* * *

SUPPLEMENTAL AFFIDAVIT TO
PHOTOGRAPHIC EXHIBIT 5

(Attached to foregoing Motion for Summary Judgment and made part thereof)

(Venue)

WARREN E. CULBERTSON, being duly sworn, upon his oath says:

Affiant makes this as a supplemental affidavit to the General Affidavit relating to the five photographs, exhibits 1 through 5. This affidavit relates to photographic exhibit 5.

This picture shows the ore pit of Duval and generally the mining method and the topography of the area.

(Signed WARREN E. CULBERTSON before a Notary Public on January 14, 1974)

* * *

The following exhibits to Motion for Summary Judgment are incorporated by reference thereto:

A. Plate 1, Bulletin 1112, U.S.G.S. with overlay;*

1. - 5. 8 x 10 colcred photographs, more particularly described in foregoing Supplemental Affidavits.

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* Because of its size, Exhibit A is filed separately in the Clerk's Office, Court of Appeals.

* * *

(TITLE OF ACTION)

DUVAL DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

Filed: February 13, 1974

DUVAL CORPORATION and DUVAL SIERRITA CORPORATION (herein called "Duval" or "Duval defendants") are defendants to a Complaint in Intervention filed by the City of Tucson, to which they have filed a Counterclaim.

Pursuant to Rule 56, A.R.C.P., Duval moves the Court for an order granting summary judgment in favor of Duval and against the City of Tucson, upon the grounds that the record before the Court, together with the Affidavits and Exhibits attached hereto and the Memorandum filed herewith show that there is no genuine issue as to any material fact, and that

Duval defendants are entitled to judgment as a matter of law.

This Motion is based upon the pleadings, depositions and Answers to Interrogatories on file herein, the Affidavits and Exhibits attached hereto and upon the Memorandum in Support of Motion for Summary Judgment which is filed herewith.

(Signed FENNEMORE, CRAIG, von AMMON & UDALL by Calvin H. Udall and James W. Johnson, Attorneys for Duval Defendants)

* * *

AFFIDAVIT OF B. G. MESSER

(Attached to foregoing Motion for Summary Judgment and made part thereof)

(Venue)

B. G. MESSER, being first duly sworn, upon his oath deposes and says that he

is a Vice President of DUVAL CORPORATION and makes this Affidavit on behalf of DUVAL CORPORATION and DUVAL SIERRITA CORPORATION, being duly authorized so to do.

He has read the "Statement of Facts" contained in Duval defendants' Memorandum in Support of Motion for Summary Judgment, dated this date, and knows the contents thereof. The facts contained in said Statement of Facts are true to the best of his knowledge.

(Signed B. G. MESSER before a Notary Public on February 12, 1974)

* * *

(TITLE OF ACTION)

DUVAL DEFENDANTS' MEMORANDUM
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

Filed: February 13, 1974

INTRODUCTION

The Motion of DUVAL CORPORATION and DUVAL SIERRITA CORPORATION (hereinafter called "Duval defendants" or "Duval") is based on two legal theories.

1. The Critical Groundwater Area Theory. FARMERS INVESTMENT COMPANY ("FICO") has filed a Motion for Summary Judgment against Duval defendants. FICO asserts that Duval defendants are transporting water outside the Sahuarita-Continental Critical Groundwat r Area. FICO also asserts that the transportation

of water outside a critical area is a per se violation of the reasonable use doctrine as enunciated and applied in the Jarvis decisions.

Duval defendants strenuously challenge both of these assertions. But if the Court should sustain the contentions of FICO and reject those of Duval, then, a fortiori and as a matter of law Duval defendants are entitled to summary judgment against the City of Tucson ("Tucson" or "City") on the same grounds.

2. The Reasonable Use Theory. If, as it should, the Court denies FICO's Motion and the Motion of Duval defendants based on the critical groundwater area theory, Duval defendants are still entitled to summary judgment against Tucson as a matter of law.

Pursuant to the mandatory duty imposed upon it by statute, the State Land

Department, by Order No. 14 on June 8, 1954, designated and established a groundwater subdivision called the "Sahuarita-Continental Subdivision of the Santa Cruz Basin". A "Groundwater Subdivision" is defined by statute as "an area of land overlying, as nearly as may be determined by known facts, a distinct body of groundwater. It may consist of any determinable part of a groundwater basin." (A.R.S. Sec. 45-301 6.).

Order No. 14 was not challenged, as provided by statute. It is binding upon all of the parties to this action and is not open to collateral attack. This Order is binding upon all of the courts of this State and of the United States.

The north boundary of both the Subdivision and the Critical Area referred to above is a common one. No part of the corporate limits of the City of Tucson

extends south of this boundary line. Tucson takes water from small parcels within the Subdivision and Critical Area, and exports this water for sale to others. The use or "beneficial use" of this water by any definition is outside the Subdivision and Critical Area, and it is a hydrological impossibility under the existing facts for any of such water to be returned to the common basin supply.

The City of Tucson admits that the groundwater supply of the Subdivision is diminishing. Its transportation of water for sale and use outside the Subdivision violates the reasonable use doctrine. This violation is an invasion of the constitutionally protected property rights of Duval defendants and of all other persons lawfully and beneficially using groundwater in the Sahuarita-Continental Subdivision of the Santa Cruz Basin.

Duval defendants are, therefore, entitled to summary judgment against Tucson, declaring Tucson's exportation and use of such water to be unlawful and enjoining it from such exportation of groundwater.

STATEMENT OF FACTS

As shown on the map which is Exhibit "A" hereto, the Sahuarita-Continental Critical Groundwater Area, south of Tucson, (the "Critical Area"), was so designated by the State Land Department on October 14, 1954. It lies entirely within the larger Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin (the "Subdivision"). A.R.S. Sec. 45-303 mandates that the Land Department "shall, from time to time as adequate factual data become available, designate groundwater basins and subdivision..."

The Sahuarita-Continental Subdivision

of the Santa Cruz Groundwater Basin was designated by the State Land Department by Order No. 14 on June 8, 1954. By statute, "'Groundwater Subdivision' means an area of land overlying as nearly as may be determined by known facts, a distinct body of groundwater. It may consist of any determinable part of the groundwater basin." A.R.S. Sec. 45-301 6.

A copy of Order No. 14 and the official map of the Sahuarita-Continental Subdivision, certified by Louis C. Duncan, Deputy State Land Commissioner, is on file with the Arizona Supreme Court in Cause No. 10486 therein. Copies of said documents, certified by Clifford H. Ward, Clerk of the Arizona Supreme Court, are attached hereto as Exhibit"B".

The City of Tucson lies north of the Subdivision and the Critical Area. However, Tucson owns several well sites

within the Critical Area and pumps such water primarily for use and sale outside of the Subdivision. Tucson owns no lands with a history of cultivation inside the Critical Area or Subdivision.

As appears from the Deposition (p. 52) of Frank Brooks, Assistant City Manager, taken in this lawsuit, such pumping by the City from the Subdivision may have commenced about 20 years ago. Since the beginning of 1964, the average rate of production from the City's wells inside the Critical Area and Subdivision has doubled from an average daily rate of 9 million gallons to 18 million gallons (Brooks' Dep., pp. 52-54). Tucson admits that it intends to continue to increase these rates and to continue to transport such water away from the Subdivision.

Duval defendants own approximately

9,430 acres of land within the Subdivision, 7,430 acres of which are within the Critical Area. This land is used for industrial, agricultural, grazing and domestic purposes. Of such acreage, approximately 1,530 acres located on the Canoa Ranch and the recently acquired Esperanza Ranch, both inside the Critical Area, have a history of cultivation and are entitled to the use of water from the groundwater supply of the Subdivision. Duval is also engaged in mining an ore body lying partially within and partially to the west of the Subdivision. The ore is hauled by trucks to mills located within the Subdivision. Industrial process water is pumped by Duval from wells located within the Subdivision and also within the Critical Area. The primary use of industrial water is to transport material within the mills and tailing

material from the mills to tailing ponds located within the Critical Area. The ponds are the points of ultimate use of the tailing transportation water which is continuously pumped back and recycled.

A secondary and much smaller use consists of leaching water through stock-piled, low grade ore. Copper is extracted from the solution below the stock-pile, and the water is recirculated. De minimis amounts of water are used in the mine and absorbed by the copper concentrates shipped from the mills. Make-up requirements for all of this industrial process water are about 17,000 acre-feet per annum. 23,000 R.O.R.

For many years, the water table within the Subdivision has been declining and the supply diminishing. Duval filed its Answer to Tucson's Complaint in Intervention on April 12, 1972 praying for an

adjudication of the relative rights of Duval and the City to the waters of the Subdivision. Duval filed its Counterclaim against the City on November 7, 1973.

ARGUMENT

1. FICO's Critical Groundwater Theory.

The first ground of Duval defendants' Motion for Summary Judgment against Tucson is conditional. Duval defendants rely on this ground only if the Court determines that FICO is entitled to summary judgment against them. For all of the reasons stated in Duval defendants' Response to FICO's Motion for Summary Judgment, FICO is not entitled to summary judgment against Duval.

FICO's Motion for Summary Judgment against Duval claims that Duval is transporting water outside the Critical Area and that transportation outside a critical

area is a per se violation of the reasonable use doctrine under the Jarvis decisions.[1] With respect to FICO's Motion, Duval's position is that (1) the actual place of consumptive use by Duval is not outside but inside the Critical Area; and (2) even if FICO's allegations of fact were taken as true, neither the Jarvis decisions, the Groundwater Code, nor the reasonable use doctrine prohibit transportation of water outside a Critical Area. What they do prohibit is transportation of water away from the land overlying the common groundwater supply, as defined by the State Land Department in designating the groundwater subdivisions which overlie "distinct bodies of groundwater" pursuant to A.R.S. Secs. 45-301 and 303. In fact, the Jarvis

[1] Jarvis, et al. v. State Land Department, et al., 104 Ariz. 527, 456 P.2d 385 (1969); Jarvis, et al. v. State Land Department, et al., 106 Ariz. 506, 479 P.2d 169 (1970).

decisions, the Groundwater Code and the Reasonable Use Doctrine specifically permit transportation to other lands outside a critical area, so long as such lands also overlie the common supply. That the Continental-Sahuarita Subdivision overlies a "distinct body of groundwater" or a "common basin supply", both factually and legally, cannot be challenged.

However, if this Court finds that FICO is entitled to summary judgment against Duval on the grounds alleged in FICO's Motion, then those same grounds compel summary judgment against Tucson and in favor of Duval on its Counterclaim. FICO's theory of the law is incorrect, but if such theory prevails, then judgment must be granted against the City in favor of Duval for the same reasons.

This is not to say that Duval is not entitled to summary judgment against the

City or that it is not being damaged by the City's pumping. Duval is entitled to summary judgment. It is essential that Tucson's pumping be declared unlawful and enjoined to protect the rights of Duval to its lawful and reasonable industrial, agricultural, grazing and domestic uses of water, and also to protect the legal rights of other users in the Subdivision. The proper grounds for granting such relief, however, are not those advanced in FICO's motion against Duval but the grounds set forth in part 2 below.

Briefly, the facts which on FICO's theory of the law justify summary judgment against the City and in favor of Duval are as follows:

Tucson is concentrating waters on several small well sites located inside the Critical Area and is transporting such water for use outside the Critical Area.

Production by Tucson for use outside the Critical Area has increased from nine million gallons per day to more than eighteen million gallons per day (20,000 acre-feet per year). Tucson intends to continue to increase the rate of its pumping and exportation of this water. Duval owns approximately 7,500 acres of land within the Critical Area entitled to the beneficial use of groundwater underlying the Critical Area. Approximately 1,530 acres of such land with a long history of cultivation are entitled to the beneficial use of water for the cultivation of crops.

Further, under FICO's reasoning Duval would be all the more entitled to judgment against Tucson than would FICO against Duval for the following reasons:

(1) The water not actually consumptively used by Duval is returned to the Critical

Area. Tucson admits that none of the water taken by it returns to the Critical Area (Tucson's Reply, par. IV); (2) Duval's wells are located on large tracts of land comprising hundreds of acres. Tucson's wells are located on small, "postage stamp sized" well sites; (3) Duval has temporarily retired hundreds of acres of land from cultivation which have a history of beneficial use for agriculture. Tucson owns no land with a history of cultivation in the Critical Area; (4) Duval's uses of water are entirely on land owned or leased by it for beneficial purposes. Tucson pumps water primarily for merchandising and sale to others.

Of course, Tucson cannot claim better water rights as a municipality than can ordinary private citizens and corporations such as Duval. In both Jarvis I

and Jarvis II, supra, the Supreme Court specifically stated that Tucson enjoyed no better rights than private owners, and that Tucson could not continue to pump water in violation of the reasonable use doctrine without first having paid just compensation to the persons whose rights were invaded.

> "'There is no apparent reason for saying that, because defendant is a municipal corporation, seeking water for the inhabitants of a city, it may therefore do what a private owner of the land may not do. The city is a private owner of this land, and the furnishing of water to its inhabitants is its private business. It is imperative that the people of the city have water; it is not imperative that the city secure it at the expense of those owning lands adjoining lands owned by the city. (Citing case)'" Jarvis v. State Land Department (Jarvis II), 106 Ariz. 506, 479 P.2d 169, 172 (1970).

See also Jarvis v. State Land Department (Jarvis I), 104 Ariz. 527, 531, 456 P.2d 385 (1969).

2. Violation of the Reasonable Use Doctrine.

Under the doctrine of reasonable use, water may be used off the land from which it is taken only when the rights of others are not injured. Fourzan v. Curtis, 43 Ariz. 140, 147, 29 P.2d 722 (1934); Jarvis II. As discussed below and in Duval's Response to FICO's Motion for Summary Judgment, the land from which the water is taken is the land which overlies the common basin supply. In this case, the land overlying the common supply has been officially defined by the State Land Department as the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin by its Order No. 14 entered June 8, 1954 pursuant to A.R.S. Sec. 45-303.

As stated in Bristor v. Cheatham (Bristor II), 75 Ariz. 227, 237-38, 255

P.2d 173 (1953), two elements must be shown in order to make out a violation of the reasonable use doctrine: (1) that the water is not diverted for the "reasonable use of the land from which it is taken", and (2) resulting injury. As to the first element, Tucson has admitted that it is transporting water away from the Subdivision for use at points where its return to the Subdivision is prevented.

As to the second element, resulting injury, Tucson has admitted that the water supply of the Subdivision is limited, that it has been diminishing for many years, and that the water table of the Subdivision has been declining for many years. Tucson's continued pumping from the Subdivision and transportation of such water to points where it cannot return to the Subdivision supply can only aggravate this overdraft situation and contribute

to the damage of all lawful users within the Subdivision. Further, by designating a Critical Groundwater Area within the Subdivision, the State Land Department has made the additional determination that there is insufficient water available to sustain agriculture at the present rates of withdrawal. This determination, made on October 14, 1954, is binding on all of the parties, including Tucson.

Therefore, as was said in the Jarvis cases, further withdrawals from the common supply can only impair the rights and deplete the supply of existing users. In Jarvis, the second element--resulting injury--was presumed solely from the fact of the existence of a designated Critical Area.[2]

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2 Contrary to FICO's position in this case, the Court did not presume the first element--failure to make a reasonable use on (sic) the land from which the water is taken--from the mere fact that transportation outside the Critical Area occurred. That issue turned on whether the water was used on land overlying the common basin supply.

Both the elements necessary to show a violation of the reasonable use doctrine have been admitted by Tucson: (1) transportation away from the common basin (Subdivision) supply to points where return to the Subdivision supply is prevented; and (2) injury to the remaining owners overlying the common supply including Duval. Duval is accordingly entitled to an order prohibiting the City from pumping water from the Subdivision for use outside the Subdivision.

The doctrine of reasonable use was adopted by the Supreme Court of Arizona in Bristor v. Cheatham (Bristor II), 75 Ariz. 228, 240 P.2d 185 (1952). It was adopted in the following language:

> "This rule does not prevent the extraction of groundwater subjacent to the soil so long as it is taken in connection with the beneficial enjoyment of the land from which it is taken. If it is

> diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner for a resulting damage." (Emphasis added).

What is meant by "the land from which it is taken" can be determined from the dissents in the first Bristor opinion which Bristor II overruled. Justice LaPrade in his dissent in Bristor I stated the reasonable use issue as follows:

> ". . . whether the owner of land overlying a supply of percolating water common to adjoining land owners may pump the water from wells upon his land and convey it to other lands for the benefit of the latter from whence it does not return to replenish the common supply, if the supply available to the adjoining landowners from pumps upon their lands drawing water therefrom is diminished to their injury." (Emphasis added) 63 Ariz. at 242.

Similarly, Justice DeConcini in his

dissent from the first Bristor opinion, explained the doctrine of reasonable use as follows:

> "Under reasonable use there is . . . a prohibition upon a use on other land or at a distance away from the base of the common supply if such alien use interferes with the use of water of other property owners. (Emphasis added) 73 Ariz. at 255.

Thus, it is clear that it violates the doctrine of reasonable use to transport water away from the base of the common supply if its return to the common supply is prevented. That was the holding in the Jarvis decisions, particularly Jarvis II, and those decisions control here. In Jarvis II, the Court said:

> "The right to exhaust the common supply by transporting water for use off the lands from which they are pumped is a rule of law controlled by the doctrine of reasonable use and protected by the constitution of the state as a right in property.

* * *

> "Tucson's delivery of water to purchasers within the Avra-Altar drainage area but outside the Marana Critical Groundwater Area is, however, without equitable sanction. There is no indication in the record that these customers of Tucson overlie the water basin so as to come within the principle applicable to Ryan Field. Until Tucson can establish that its customers outside the Marana Critical Groundwater Area but within the Avra-Altar Valleys' drainage areas overlie the water basin so as to be entitled to withdraw water from it, there are no equities which will relieve it of the injunction heretofore issued." (Emphasis added) 479 P.2d at 173.

The identical situation is present here. Tucson is transporting water away from the water basin which forms the common supply of the Subdivision. Such water is forever lost to the common supply.

In fact, as can be seen from many of the cases cited by the Arizona Supreme Court in the Jarvis decisions, the doctrine of reasonable use arose in exactly

this context. Municipalities were installing wells on small parcels and transporting the groundwater pumped therefrom away from the base of the common supply for sale to the customers and for use at points where it would never return to the common basin. As was said in Canada v. City of Shawnee, 64 P.2d 694, 697 (Okla. 1936), rehearing denied (1937), "practically all of the cases in which this rule of . . . reasonable use has been applied were cases in which percolating water was being extracted from land for the purpose of sale at a distance, for use in supplying water to cities and towns. . . . "

For example, in Katz v. Walkinshaw, 70 Pac. 663 (Cal. 1902), on rehearing, 74 Pac. 766 (Cal. 1903), the court defined the land from which the water is taken as the "water-bearing land" (p. 771) and the "land overlying the water-bearing strata" (p. 772).

It held the defendant could not divert "water for sale, to be used on the lands of others distant from the saturated belt from which the artesian water is derived" (emphasis added). (70 Pac. at 664). Likewise, in Burr v. Maclay Rancho Water Co., 98 Pac. 260, 264 (Cal. 1908), the court held that

> ". . . one cannot, to the injury of the other, take such waters from the strata and conduct the same to distant lands not situated over the same water-bearing strata." (Emphasis added)

Further,

> "The reasonable rule here would be to hold that defendants' appropriation for distant lands is subject to the reasonable use of the water on lands overlying the supply. . . . " (Emphasis added)

And in the following cases cities were enjoined from concentrating water on small well sites and transporting it away from

the boundaries of the common supply:

Schenk[illegible] City of Ann Arbor, 163 N.W. 109, [illegible] 1917), (held unlawful ". . . to pipe some water away from the land, to sell some of it, to use some of it for municipal purposes, [and] not to return any [illegible] to the land."); Volkmann v. City of [illegible], 120 N.W.2d 18, 22-23 (N.D. 1963) (water was ". . . piped to the city which [illegible] not located above the source of supply where it is used for municipal purposes and for sale to individuals . . . . " (emphasis added); Forbell v. City of New [illegible], 61 N.E. 644, 645-46 (N.Y. App. [illegible] City could not take water beyond the boundaries of the common supply" . . . [illegible] by merchandising it, prevent its [illegible] . . . "); Evans v. City of Sea[illegible] 37 P.2d 984 (Wash. 1935), (the rule applies ". . . to the subject

of water from a saturated stratum extending under the property of several owners,"; City of San Bernardino v. City of Riverside, 198 Pac. 784 (1921).

The facts necessary to show a violation of the reasonable use doctrine are undisputed: (1) Tucson is transporting water out of the Subdivision, which defines the "distinct body of groundwater" which is the common groundwater supply for Duval and others; and (2) the common basin supply of the Subdivision is now and since prior to 1954 being depleted; pumping by the City is contributing to that overdraft. Further, the water pumped by Tucson does not return to the Subdivision; it is forever lost. Duval is entitled to judgment on its Counterclaim and to an order permanently enjoining Tucson, its agents, servants and employees from

transporting any water from the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin of Pima County, Arizona.

(Signed FENNEMORE, CRAIG, von AMMON & UDALL by Calvin H. Udall and James W. Johnson, Attorneys for Duval Defendants)

(The following exhibits to Motion for Summary Judgment of Duval Defendants are incorporated by reference thereto:

A. Map of Sahuarita-Continental Critical Groundwater Area and Subdivision;

B. Official Map of the State Land Department of the Sahuarita-Continental Subdivision of the Santa Cruz Basin as established June 18, 1954, by Order No. 14)

* * *

(TITLE OF ACTION)

NOTICE OF DEPOSITION

Dated: March 13, 1974

Note: Notice of Deposition is missing from the Court file; the following was obtained from Mr. Wilmer's file.

NOTICE TO:

AMAX COPPER MINES, INC. and THE ANACONDA COMPANY, as partners in and constituting ANAMAX MINING COMPANY, a partnership, and ANAMAX MINING COMPANY, a partnership.

Pursuant to Rule 30(b)(6) Arizona Rules of Civil Procedure, you are hereby notified that the deposition of the above named private corporations and partnership

will be taken in the offices of Lesher & Scruggs, P.C., 3773 East Broadway, Tucson, Arizona, on March 25, 1974 beginning at the hour of 2:00 P.M. on said day. You are hereby requested to designate an appropriate officer, director, managing agent or other person or persons to appear and testify pursuant to the provisions of the Rule above cited with respect to the following matters in relationship to the business and affairs of the above-named corporations and partnership, to-wit:

Present plans and any plans under consideration by said defendants and any of them as to:

(i) Additional water wells to be drilled for use by said defendants and any of them for both present mining and milling operations of defendants in the Upper Santa Cruz Valley area and for use in connection with expected or prospective

mining and milling operations of defendants and any of them in this general area of Pima County;

(ii) The location or contemplated location of each such well and well site by smallest legal subdivision practicable and also in relation to the farm lands of FARMERS INVESTMENT COMPANY.

(iii) The purpose for which the water production from said additional wells is to be used and the reason such additional water production is or may be needed;

(iv) The amount of water which it is estimated will be withdrawn by use of said additional wells in the first, second and third years of production of water after the wells, and each of them, is put into production;

(v) The amount of water produced by said additional wells to be used in present milling and mining operations.

(Signed SNELL & WILMER by
Mark Wilmer, Attorneys for
Plaintiff)

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

I Craig Swick hereby certify:
Name

That I am Reference Librarian, Law & Research Library Division of the Arizona State
Title/Division
Library, Archives and Public Records of the State of Arizona;

That there is on file in said Agency the following:

Microfilm of Farmer's Investment Company v. Pima Mining Company et al, Arizona Supreme Court Case No. 11439-2, Abstract of Record on Appeal Volume I, pages 1-120 in Farmers Investment Company v. Anaconda Company, et al., filed March 17, 1975. Court of Appeals Instruments (Part Two) Page 121 with the Table of Contents (7 pages) and Abstract (120 pages) following.

The reproduction(s) to which this affidavit is attached is/are a true and correct copy of the document(s) on file.

Craig D. Swick
Signature

Subscribed and sworn to before me this 12/16/2005
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2005
Date

Notary Public State of Arizona
Maricopa County
Etta Louise Muir
My Commission Expires
04/13/2009